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**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

Carl A. Wescott,

Plaintiff,

vs.

David Crowe; Mike Lyonette;  
Thomas P. Madden; Taylor Collins; Jeff  
Rau; Darrell Bushnell; Amy Bushnell;  
Peter Tierney; Kathy Fettke; Susie Yee;  
Norman Davies; Claire Davies; Sandra  
Winfrey; Brian Putze; Colin Ross;  
Brad Malcolm; Michael Jimenez; Gustavo  
Varela; Robert Crowe; Bernadette Brown;  
Federico Gurdian; Terencio Garcia, Does 1  
through 50,

Defendants.

Case No: 2:20-cv-01383-PHX-CDB

**MOTION TO DISMISS**

Pursuant to Rule 12(b)(2) and (6) of the Federal Rules of Civil Procedure, Defendants David Crowe, Mike Lyonette, Thomas P. Madden, Peter Tierney, Colin Ross, Brad Malcolm, and Michael Jimenez (“Defendants”) respectfully move the Court for an Order dismissing Plaintiff’s First Amended Complaint (Doc. #26) and/or certain claims contained therein for lack of personal jurisdiction and failure to state a claim against these Defendants upon which relief can be granted. This Motion to Dismiss (“Motion”) is supported by the following Memorandum of Points and Authorities, the Court’s entire file in this matter, and any oral argument that the Court may wish to hear.<sup>1</sup>

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **INTRODUCTION**

Plaintiff brought his complaint alleging breach of contract and misrepresentation; yet, the allegations are against individuals who are not even parties to the very contract that he claims has been breached. What’s more is that **none** of the Defendants have any ties to Arizona, where Plaintiff arbitrarily filed this matter – contrary to the provision contained in the contract at issue. Plaintiff does not even attempt to set forth any facts as to why Arizona has jurisdiction over the Defendants. Further, Plaintiff’s amended complaint, styled “Plaintiff’s [Corrected] Complaint...” (“Amended Complaint”) fails to state facts sufficient to support *any* of the causes of actions alleged against *any* of the Defendants.

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<sup>1</sup> Pursuant to L.R.12.1(c), Defendants’ counsel met and conferred with Plaintiff via letter dated June 29, 2020, which stated the lack of jurisdiction and failure to state a claim. Plaintiff was not responsive to the letter or multiple emails which were sent thereafter to try and work out this dispute. The parties have been unable to agree that the pleading is curable by a permissible amendment.

## STATEMENT OF FACTS

In the case at Bar, Plaintiff alleges that he is an experienced international real estate developer, with a focus on residential developments in Latin America. (Amended Complaint, ¶11.) Plaintiff also alleges that he entered into a contract to purchase property commonly known as the Seaside Mariana<sup>2</sup> (“Resort”), located in Nicaragua (“Purchase Contract”), with the intention of improving the Resort and, in turn, selling it to make a profit. (Amended Complaint, ¶13.) Plaintiff further alleges that after he entered into the Purchase Contract, he then entered into the subject contract with Defendants in August 2018 to fund his purchase of the Resort (“Funding Contract”). (Amended Complaint, ¶21.) According to Plaintiff, in exchange for entering into the Funding Contract, Defendants were to receive a portion of land owned by the Resort, which was to be transferred to the Defendants as the consideration for the Funding Contract. (*Id.*)

Yet, as alleged by Plaintiff himself, the **only** individuals who were a party to the Funding Contract were Plaintiffs David Crowe and Mike Lyonette. (Amended Complaint, ¶28<sup>3</sup>; Complaint, Ex A.) Regardless of who the parties to the Funding Contract were, that contract became null and void once the seller terminated the purchase contract for the

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<sup>2</sup> It is Defendants’ belief that the name of the Resort is Seaside Mariana Spa and Golf Resort, but are referring to it herein as referenced in Plaintiffs’ Amended Complaint. (Amended Complaint, ¶13.)

<sup>3</sup> While the Funding Contract was attached to the original Complaint, it was not made a part of the operative pleading in this case, the Amended Complaint. Presumably, Plaintiff realized all too late that by attaching the Funding Contract to the Complaint, he was not just including the contract at issue, he was including the document that **clearly** states that jurisdiction is held in California!

1 Resort. The closing on the purchase of the Resort never happened. As a result, the Funding  
2 Contract became obsolete as there were no funds needed for a sale that was cancelled.

### 3 LEGAL STANDARDS

#### 4 **A. RULE 12(b)(2) STANDARD**

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6 In a motion to dismiss for lack of jurisdiction, the “party seeking to invoke the  
7 court’s jurisdiction bears the burden of establishing that jurisdiction exists.”  
8 *Scott v. Breeland*, 792F.2d 925, 927 (9th Cir. 1986). Plaintiff must make a prima facie  
9 showing of jurisdictional facts to withstand a motion to dismiss. *Ballard v. Savage*, 65  
10 F.3d 1495, 1498 (9th Cir. 1995); see also *Schwarzenegger v. Fred Martin Motor Co.*, 374  
11 F.3d 797, 800(9th Cir. 2004).  
12

#### 13 **B. RULE 12(b)(6) STANDARD**

14  
15 A complaint should be dismissed if it appears beyond doubt that a plaintiff can  
16 prove no set of facts in support of a claim which would entitle the plaintiff to relief.  
17 *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th 2000). In considering a  
18 motion to dismiss for failure to state a claim, all factual allegations of the complaint are  
19 presumed true and all reasonable inferences are made in favor of the non-moving party.  
20  
21 *Rhodes v. Robinson*, 408 F.3d 559, 563 (9th 2005). However, legal conclusions or  
22 characterizations in a complaint do not preclude dismissal merely because they are cast in  
23 the form of factual allegations, as such conclusions or characterizations are not entitled to a  
24 presumption of truthfulness. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th  
25 2004).  
26  
27

1 “In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual  
2 content, and reasonable inferences from that content, must be plausibly suggestive of a  
3 claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th  
4 Cir. 2009) (internal quotation marks omitted).

## 5 6 ARGUMENT

### 7 8 **A. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE** 9 **12(b)(2) AS DEFENDANTS ARE NOT SUBJECT TO PERSONAL** 10 **JURISDICTION IN THIS COURT.**

11 Federal Rule of Civil Procedure 12(b)(2) requires dismissal of an action when the  
12 court lacks personal jurisdiction over the defendant. “When the exercise of personal  
13 jurisdiction is challenged pursuant to Rule 12(b)(2), Fed.R.Civ.P., the question ‘is one for  
14 the judge, with the burden on the plaintiff ultimately to prove the existence of a ground for  
15 jurisdiction by the preponderance of the evidence.’” *Rannoch, Inc. v. Rannoch Corp.*, 52 F.  
16 Supp. 2d 681, 683-84 (E.D. Va. 1999) (quoting *Combs v. Bakker*, 886 F.2d 673, 676 (4th  
17 Cir. 1989)).

18  
19 To establish jurisdiction over the Defendants, none of whom reside in Arizona, this  
20 Court must first consider whether jurisdiction is authorized by Arizona law. The analysis of  
21 personal jurisdiction is normally a two-step inquiry, requiring the application of both  
22 statutory and constitutional components. *Young v. New Haven Advocate*, 315 F.3d 256, 261  
23 (4th Cir. 2002). “Where, as here, there is no applicable federal statute governing personal  
24 jurisdiction the district court applies the law of the state in which the district sits.”  
25 *Schwarzenegger*, 374F.3d at 800 (citing FED.R.CIV.P. 4(k)(1)(A); *Panavision Int’l, L.P. v.*  
26 *Toeppen*, 141 F.3d1316, 1320 (9th Cir. 1998)). Because Arizona’s long-arm statute is co-  
27

1 extensive with federal due process requirements, the jurisdictional analyses under Arizona  
2 law and federal due process are the same. See ARIZ.R.CIV.P. 4.2(a); *Doe v. Am. Nat'l Red*  
3 *Cross*, 112 F.3d1048, 1050 (9th Cir. 1997).

4  
5 “The due process clause of the Fourteenth Amendment requires that the defendant  
6 must have minimum contacts with the forum state ‘such that the maintenance of the suit  
7 does not offend traditional notions of fair play and substantial justice.’” *Sinatra v. Nat’l*  
8 *Enquirer, Inc.*, 854 F.2d 1191, 1194 (9th Cir. 1988); see also *Int’l Shoe Co. v. Washington*,  
9 326 U.S.310, 316 (1945). In the Ninth Circuit, specific jurisdiction may be exercised only  
10 if: (1) the defendant purposefully avails himself of the privileges of conducting activities in  
11 the forum, thereby invoking the benefits and protections of its laws, or purposely directs  
12 conduct at the forum that has effects in the forum; (2) the claim arises out of the  
13 defendant’s forum-related activities; and (3) the exercise of jurisdiction comports with fair  
14 play and substantial justice, i.e., it is reasonable. *Bancroft & Masters, Inc. v. Augusta Nat’l*  
15 *Inc.*, 223 F.3d 1082, 1086 (9thCir. 2000) (citing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d  
16 414, 416 (9th Cir. 1997)). If Plaintiff succeeds in establishing the first two elements of this  
17 test, the burden shifts to Defendants to “‘present a compelling case’ that the exercise of  
18 jurisdiction would not be reasonable.” *Schwarzenegger*, 374 F.3d at 802 (quoting *Burger*  
19 *King Corp. v. Rudzewicz*, 471U.S. 462, 476–78 (1985)). The Ninth Circuit has noted that  
20 “litigation against an alien defendant requires a higher jurisdictional barrier than litigation  
21 against a citizen from a sister state.” *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir.  
22 1993).  
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1 Therefore, it is necessary to examine carefully the nature of a defendant's contacts  
2 with Arizona in order to determine whether he may fairly be subjected to suit. To do so, the  
3 Court must first examine whether there were any activities in Arizona giving rise to the  
4 action, and any additional contacts that are unrelated to the action, as these different types  
5 of contacts are judged by different standards.  
6

7 In this case, the only Defendants who entered into the Funding Contract are David  
8 Crowe and Mike Lyonette. (Original Complaint, Ex. A.) As such, David Crowe and Mike  
9 Lyonette are the only two parties who even arguably may have any contractual ties to  
10 Plaintiff based on the allegations contained in the Amended Complaint. Thomas P.  
11 Madden, Peter Tierney, Colin Ross, Brad Malcolm, and Michael Jimenez all seek relief  
12 under 12(b)(2) as they have not conducted any activities within the State of Arizona or  
13 purposely directed any conducted towards the jurisdiction. The facts as demonstrated in the  
14 pleadings show that only David Crowe and Mike Lyonette were parties. There are no facts  
15 stated in the Amended Complaint which show that Thomas P. Madden, Peter Tierney,  
16 Colin Ross, Brad Malcolm, and Michael Jimenez ever entered into a contract with Plaintiff,  
17 much less having entered into a contract in Arizona or taken any actions which would lead  
18 to personal jurisdiction within Arizona. Accordingly, these Defendants should be dismissed  
19 for lack of personal jurisdiction.  
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21  
22

23 As for Defendants David Crowe and Mike Lyonette, who signed the Funding  
24 Contract, they also should be dismissed for lack of personal jurisdiction. The Funding  
25 Contract itself has a jurisdiction and venue clause which states that the contract "shall be  
26 governed by and construed in accordance with the laws of San Francisco, California in the  
27

United States of America, and thus that shall be the jurisdiction and venue for this contract.” (Original Complaint, Ex. A, pg. 6). The Funding Contract makes it clear that to the extent Plaintiff has any claim against any of the Defendants that both jurisdiction and venue must be in California – they do not exist in Arizona. Thus, this Motion should be granted as to all Defendants.

**B. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(b)(6) AS PLAINTIFF HAS FAILED TO STATE FACTS SUFFICIENT TO SUPPORT ANY OF HIS CLAIMS.**

The Court can and should dismiss this case as to all Defendants for lack of personal jurisdiction. In the event that the Court concludes otherwise, the Court should still dismiss the Complaint as to all Defendants<sup>4</sup> for failure to state a claim on each cause of action.

As stated above, the subject contract at issue, the Funding Contract, contains a provision requiring it to be governed by California law. *Id.* As such, all of the Defendants’ citations will be to California law.

**1. Elements for Breach of Contract Are Not Established.**

The essential elements to be plead in an action for breach of contract are (1) the existence of a contract; (2) Plaintiff’s performance of the contract or excuse for non-performance; (3) Defendant’s breach of the contract; and (4) the resulting damages to Plaintiff. *Lortz v. Connell* (1969) 273 Cal. App. 286, 290.

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<sup>4</sup> The undersigned counsel also now represent Defendant Jeff Rau. Since Defendant Rau already answered the Complaint he cannot join in this motion. Notwithstanding, the arguments made by the Defendants under FRCP 12(b)(6) should apply to him as well and the Court would be within its jurisdictional authority to also dismiss the complaint against him.



1 While Plaintiff has identified the Funding Contract, the contract itself shows that  
2 none of the Defendants other than David Crow and Mike Lyonette are parties to it.  
3 Therefore, Plaintiff cannot enforce this contract as to Thomas P. Madden, Peter Tierney,  
4 Colin Ross, Brad Malcolm, and Michael Jimenez.  
5

6 Under the second element, Plaintiff must prove that he has fulfilled his obligations  
7 and complied with any and all conditions and agreements of the contract that he is required  
8 to perform. *See Pry Corp. of American v. Leach* (1960) 177 Cal. App. 2d 623, 639-40.  
9 Plaintiff admits that the seller (“Fleming” or “Seller”) of the Resort backed out of selling  
10 the Resort to Plaintiff. The Funding Contract states in Article 1, Section 10 that Plaintiff  
11 has “bound” the seller of the Resort in a contract that ensures David Crow and Mike  
12 Lyonette will get everything they need at the closing. However, Plaintiff failed to get the  
13 Seller to complete the closing of the sale and thus failed to perform under the contract. As  
14 shown in Exhibit B to the Amended Complaint, Fleming informed Plaintiff that he had  
15 terminated the sale of the Resort to Plaintiff. (Amended Complaint, Ex. B, pg. 2.)  
16  
17

18 Finally, under the third element, a “breach” is defined as a defendant’s unjustified or  
19 unexcused failure to perform. Plaintiff must plead the facts constituting the breach in  
20 unequivocal language. *See Poirier v. Gravel* (1891) 88 Cal. 79. Here, Plaintiff merely  
21 claims that all Defendants breached by failing to close on the Funding Contract. (Amended  
22 Complaint, ¶ 58.) However, this does not add up. The sole purpose of the Funding Contract  
23 was to fund the purchase of the Resort. Yet, the Seller terminated the contract with Plaintiff  
24 for the purchase and sale of the Resort. This begs the question, how can it be alleged that  
25 Defendants breached a contract of which the performance of said contract was invalidated  
26  
27

1 by the termination of the sale? The simple answer is, they didn't – there was no sale and  
2 thus there was no breach (nor frankly could there be a breach).

3  
4 Plaintiff may have a claim against the Seller of the Resort, but what is clear by his  
5 Amended Complaint is that Plaintiff does not have a breach of contract claim against any of  
6 the Defendants for at least the reasons stated above. As such, Plaintiff's cause of action for  
7 breach of contract should be dismissed, and Plaintiff should be denied leave to amend, since  
8 any attempt to correct as to the necessary elements for a breach of contract would be futile.  
9

10 **2. Plaintiff's 2<sup>nd</sup> and 3<sup>rd</sup> Causes of Action for Promissory Fraud and**  
11 **Negligent Misrepresentation Fail to State Facts Sufficient to State a**  
12 **Cause of Action.**

13 Plaintiff's second and third causes of action for Promissory Fraud and Negligent  
14 Misrepresentation contain nothing more than conclusory allegations and a guess that  
15 Defendants committed fraud by never intending to close on the Funding Contract.  
16 However, as shown above, the closing on the Funding Contract could not occur as Fleming  
17 cancelled the sale of the Resort to Plaintiff.

18 Under Federal Rule of Civil Procedure 9(b), a cause of action for fraud must be pled  
19 with particularity. "To comply with Rule 9(b), allegations of fraud must be specific enough  
20 to give defendants notice of the particular misconduct which is alleged to constitute the  
21 fraud charges so that they can defend against the charge and not just deny that they have  
22 done anything wrong." *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)  
23 (citations and internal quotations omitted).  
24  
25

26 The elements of fraud are: (1) a misrepresentation (false representation,  
27 concealment, or nondisclosure); (2) knowledge of falsity (or *scienter*); (3) intent to defraud,

1 i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior*  
2 *Court*, 12 Cal. 4th 631, 638 (1996); *see also Cleveland v. Deutsche Bank Nat'l Trust Co.*,  
3 2009 U.S. Dist. LEXIS 7165, at \*8 (S.D. Cal. Feb. 2, 2009). The complaint must plead in  
4 detail "the time, place, and manner of each act of fraud, plus the role of each defendant in  
5 each scheme." *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405  
6 (9th Cir. 1991). The complaint must also "set forth what is false or misleading about a  
7 statement, and . . . an explanation as to why the statement or omission complained of was  
8 false or misleading." *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999). Rule  
9 9(b) requires plaintiffs to differentiate between the conduct of each defendant and "inform  
10 each defendant separately of the allegations surrounding his alleged participation in the  
11 fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (quoting *Haskin v. R.J.*  
12 *Reynolds Tobacco Co.*, 995 F. Supp. 1437, 1439 (M.D. Fla. 1998)).

13  
14  
15  
16 Here, Plaintiff has not alleged any of the elements of fraud with sufficient  
17 particularity. Plaintiff does not identify a single statement or misrepresentation made by  
18 any of the named Defendants. Indeed, Plaintiff complains only that it is *possible* the  
19 Defendants never intended to close on the Funding Contract. Plaintiff does not identify any  
20 false statements made by the Defendants, the name of the person who spoke, their capacity  
21 to speak, the person to whom the speech was addressed, what was said, and when it was  
22 said. A complaint lacking such allegations does not state facts sufficient to charge a  
23 Defendant with fraud. *See Id.* All of the twenty plus Defendants are lumped together with  
24 absolutely no way to determine against which Defendant(s) the allegations are plead.  
25  
26  
27

1           Regardless, as stated above, the only two Defendants who were actually parties to  
2 the Funding Contract were excused from performance due to the Seller's termination of the  
3 sale of the Resort to Plaintiff. Thus, Plaintiff's second and third causes of action should be  
4 dismissed. Further, the Court should deny leave to amend this claim because Plaintiff  
5 cannot amend to get around the impossibility of closing on the Funding Contract, leaving  
6 Plaintiff with a total lack of existence of any facts that could be construed to state a claim  
7 for fraud against Defendants.  
8

9  
10                   **3. Plaintiff's 4th Cause of Action for Intentional Interference with**  
11                   **Contract Fails to State Facts Sufficient to State a Cause of Action.**

12           Plaintiff claims that the Defendants' refusal to close on the Funding Contract  
13 interfered with his relationship with Fleming. Plaintiff once again has lumped all of the  
14 Defendants together, despite only two of them being parties to the Funding Contract,  
15 whose alleged breach he claims resulted in the interference with the Fleming contracts.  
16

17           “To prevail on a cause of action for intentional interference with contractual  
18 relations, a plaintiff must plead and prove (1) the existence of a valid contract between the  
19 plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the  
20 defendant's intentional acts designed to induce a breach or disruption of the contractual  
21 relationship; (4) actual breach or disruption of the contractual relationship; and (5)  
22 resulting damage. *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148. The Reeves Court  
23 further states that, “[t]o establish the claim, the plaintiff need not prove that a defendant  
24 acted with the primary purpose of disrupting the contract, but must show the defendant's  
25 knowledge that the interference was certain or substantially certain to occur as a result of  
26 his or her action.” *Id.*  
27

1 Plaintiff fails to provide any facts showing a valid contract between Plaintiff and  
2 Fleming. Plaintiff merely references that he had numerous other contracts to purchase  
3 assets. However, Plaintiff does not state facts to show any valid contract which could have  
4 been interfered with.  
5

6 Plaintiff generally throws out the conclusory allegation that the Defendants knew of  
7 the many contracts he had with Fleming. However, Plaintiff's vague allegations that failure  
8 to close on the Funding Contract would lead to all of his contracts with Fleming failing is  
9 far too attenuated. There is no direct causal link.  
10

11 Plaintiff has no facts which show any direct action on behalf of the Defendants  
12 (keeping in mind that most all of them were not even a party to the Funding Contract) were  
13 designed to induce a breach of any of Plaintiff's contracts with Fleming. Plaintiff must  
14 show some action which actually interfered with the contract. Failing to provide funds for a  
15 wholly separate contract, even if true, would not be interference with other contracts the  
16 Plaintiff may have had.  
17

18 Importantly, Plaintiff's damages are wholly speculative. Plaintiff runs amok with his  
19 claims of the many contracts to which he may have been able to make money; however,  
20 the fact of the matter remains, none of these alleged contracts would have been *guaranteed*  
21 money. Additionally, they were not sufficiently set forth to allow a reasonable person to  
22 understand their validity or the basis for Plaintiff's money-making scheme.  
23  
24

25 In all, Plaintiff has failed to state any of the elements necessary to succeed on this  
26 cause of action. Even if Plaintiff could show other contracts existed, he cannot show  
27 intentional interference with unrelated contracts due to Defendants' excused performance

1 in funding a separate property. As such, this cause of action should be dismissed and leave  
2 to amend denied.

3  
4 **4. Plaintiff's 5th Cause of Action for Negligent Interference with**  
5 **Economic Advantage Fails to State Facts Sufficient to State a Cause**  
6 **of Action.**

7 Plaintiff claims that the Defendants knew of his economically advantageous  
8 relationship with Fleming and that by not funding his purchase of the Resort, Defendants  
9 caused him to lose this relationship. Once again, Defendants must point out that only David  
10 Crowe and Mike Lyonette were even parties to the Funding Contract and, therefore, could  
11 not have possibly been links between the failure to fund and the loss of this relationship  
12 even if this were true, which Defendants do not believe it is.

13 The elements of negligent interference with prospective economic advantage are (1)  
14 the existence of an economic relationship between the plaintiff and a third party containing  
15 the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of  
16 the relationship; (3) the defendant's knowledge (actual or construed) that the relationship  
17 would be disrupted if the defendant failed to act with reasonable care; (4) the defendant's  
18 failure to act with reasonable care; (5) actual disruption of the relationship; and (6)  
19 economic harm proximately caused by the defendant's negligence." (*Redfearn, supra*, 20  
20 Cal.App.5th at 1005.) " 'The difference between intentional interference and negligent  
21 interference with prospective economic advantage relates to the defendant's intent.' " (*Id.*  
22 at 1006.)  
23  
24  
25

26 This tort requires an independently wrongful act. "An act is not independently  
27 wrongful merely because defendant acted with an improper motive. ... [A]n act is

1 independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional,  
2 statutory, regulatory, common law, or other determinable legal standard.” (*Korea Supply*  
3 *Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1158-1159.) “Commonly included  
4 among improper means are actions which are independently actionable, violations of  
5 federal or state law or unethical business practices, e.g., violence, misrepresentation,  
6 unfounded litigation, defamation, trade libel or trademark infringement.” (*Pmc, Inc. v.*  
7 *Saban Entm't* (1996) 45 Cal.App.4th 579, 603.)  
8

9  
10 Plaintiff does not meet any of the elements for this cause of action. The speculative  
11 statements that Plaintiff may have been able to complete other deals with Fleming are just  
12 that, speculative, and do not prove an actual economic relationship existed. Plaintiff’s  
13 conclusory allegations that the Defendants knew of the economic relationship are very thin,  
14 to say the least. There are no facts alleged, just a conclusory statement that they knew of  
15 the relationship and that if they failed to fund the purchase of the Resort, his relationship  
16 would be disrupted. This applies to each element listed.  
17

18  
19 However, the main crux of the failure is that Plaintiff must show a wrongful act on  
20 behalf of the Defendants, which he has not done. Even if, for argument’s sake, the two  
21 Defendants who were a party to the contract did breach the contract (which they did not),  
22 that still would not rise to a wrongful act that is unlawful. As stated in *PMC, Inc.*,  
23 misrepresentations or other normal bad actions do not rise to the level of the wrongful act  
24 which is required under this cause of action.  
25

26 In addition, “ ‘[t]he tort of negligent interference with economic relationship arises  
27 only when the defendant owes the plaintiff a duty of care.’ ” (*LiMandri v. Judkins* (1997)

52 Cal.App.4th 326, 348.) Plaintiff has not stated any facts which show that the Defendants owed Plaintiff a duty of care. There are no facts in the Amended Complaint at all which show any relationship between Plaintiff and any of the Defendants, except David Crowe and Mike Lyonette. Regardless, Plaintiff wholly fails to allege any facts showing that they owed him a duty with regard to his relationship with Fleming. As such, this entire cause of action should be dismissed without leave to amend.

**5. Plaintiff's 6th Causes of Action for Breach of the Covenant of Good Faith & Fair Dealing Fails to State Facts Sufficient to State a Cause of Action.**

The covenant of good faith and fair dealing is implied into every contract, and it “requires that neither party do anything which will deprive the other of the benefits of the agreement.” *Gibson v. Gov’t Employees Ins. Co.* (1984) 162 Cal. App. 3d 441, 445. “The implied covenant of good faith and fair dealing does *not* extend beyond the terms of the contract at issue.” *Poway Royal Mobilehome Owners Ass’n v. City of Poway* (2007) 149 Cal. App. 4th 1460, 1477 (citing *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal. App. 4th 1088, 1096); *see also Gibson*, 162 Cal. App. 3d at 446. “Because contracts differ, the nature and extent of the duties owed under the implied covenant are also variable and ‘will depend on the contractual purposes.’” *Love v. Fire Ins. Exch.* (1990) 221 Cal. App. 3d 1136, 1147 (quoting *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal. 3d 809, 818).

Here, there are not any facts alleged which show that any of the Defendants did anything which would deprive Plaintiff of the benefits of the agreement. As shown above, the Funding Contract could not be closed upon due to Fleming backing out of the sale of



1 the Resort to Plaintiff. There was no breached duty and no facts which show that a duty  
2 even existed. Just as Plaintiff's breach of contract claim fails particularly against all of the  
3 non-contracting Defendants, but also as well as the two contracting Defendants, this claim  
4 also fails and should be dismissed without leave to amend.  
5

6  
7 **CONCLUSION/PRAYER FOR RELIEF**

8 Plaintiff's Amended Complaint fails against the Defendants for, amongst others, 1)  
9 lack of personal jurisdiction (not only because none of the Defendants have ties to the  
10 jurisdiction, but most importantly, because the action was not brought in the correct  
11 jurisdiction according to the subject contract); and 2) failure to state facts sufficient to  
12 support any of the listed causes of action contained in Plaintiff's Amended Complaint.  
13 Leave to amend should be denied as there are no facts which could be alleged to overcome  
14 the deficiencies in the Amended Complaint. As such, Defendants respectfully request that  
15 the Amended Complaint be dismissed and leave to amend be denied.  
16  
17

18 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of July, 2020.

19 WALLIN HESTER, PLC  
20

21 By: /s/ Chad A. Hester  
22 Chad A. Hester, Esq. (No. 022894)  
23 *Attorneys for Removing Defendants*  
24

25 ///

26 ///

27

WALLINHESTER<sup>PLC</sup>  
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1 ELECTRONICALLY filed and copy  
2 emailed this 20<sup>th</sup> day of July, 2020, to:

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